BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARENE E. WENTZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,768
LOGAN COUNTY HOSPITAL	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the June 11, 2013, preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

APPEARANCES

R. Douglas Sebelius, of Norton, Kansas, appeared for the claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

This Board Member has adopted the same stipulations and reviewed the same record as did the ALJ. The record includes: Preliminary Hearing Transcript, dated October 6, 2008, with exhibits and the Preliminary Hearing Transcript, dated June 10, 2013, with exhibits.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for bilateral knee replacement. The ALJ noted claimant has not worked for respondent for the past six years, instead, working for another employer, performing heavy physical labor. The physical duties of the new job added stress to claimant's knees and aggravated his condition. The ALJ determined the new job, with its heavy work demands constituted an intervening factor for both the current need for and request for surgery.

The claimant appeals, arguing this is a continuation of the treatment that was authorized in 2008, and that surgery should be authorized since he had only been receiving conservative treatment before. Claimant contends the ALJ erred in finding his current knee condition and need for knee replacement did not arise out of and in the course of his employment. Claimant requests the Board reverse the ALJ's decision and order the bilateral knee replacement surgery.

Respondent argues the ALJ's Order should be affirmed. Respondent contends that it is almost inconceivable that claimant's heavy physical work for a number of years at 60 - 70 hours a week, with the weight and type of work he has been performing, would not have caused some aggravation to claimant's condition. Respondent agrees claimant may have a work-related injury, but contends it is related to his current work activities with his current employer rather than to the traumatic event that occurred in September 2006.

FINDINGS OF FACT

Claimant originally worked for respondent as the head of the maintenance, laundry and housekeeping departments. On September 15, 2006, he injured his knees when he fell forward, hitting both knees on the broken edge of a cat walk. Both his knees were hyper-extended. He was sent to the emergency room and then saw Dr. Charles Zerr. He was off work three days. Claimant testified that he received treatment initially for his left knee and then for his right knee, testifying that he was told the insurance carrier would only treat one knee at a time.

Dr. Zerr referred claimant to Abdul Ahad Haleem, M.D., of the Hays Orthopedic Clinic, where, in May 2007, claimant was given three Synvisc shots in his left knee. In July 2007, claimant was given a series of Synvisc shots in his right knee. Claimant returned to Dr. Haleem on September 13, 2007. Dr. Haleem's records indicate that claimant told him he had a marked improvement of the symptoms in his right knee.

Claimant did not receive any more treatment to either knee until June 5, 2008. He said he waited that long because he was told he had to wait at least six months before he could get more Synvisc shots and also he was trying to tolerate the pain. In June 2008, claimant returned to Dr. Haleem because both of his knees were giving him problems. An MRI of the right knee showed a posteromedial meniscal tear. Dr. Haleem recommended arthroscopic surgery on his right knee.

Claimant admits he has had arthritis in his knees since he was 40 years old, but his pain had been controlled by medication before this accident. He had no new injuries to his knees between September 2006 and the 2008 return for medical treatment. He testified that the pain in his knees for the two years after his accident had been fairly consistent, other than some minor relief from the Synvisc shots.

Claimant left his employment at respondent some time after his accident. He worked for a convenience store for a couple of months and then started work for Allied Cement in May 2007 as a cement truck driver. His primary job was to drive the cement truck, but he was also responsible for setting up the truck and cleaning it at the end of the day. At times, he was required to climb a ladder to open the lid on the truck, but he accommodated his knee problems so he only had to climb four steps to get to the top. He also had to climb a couple of steps to get up into the truck. He testified that his knees would be painful as he would get in and out of his truck so he did not step up into the truck, but instead pulled himself in with his arms. Claimant would also help load the bulk truck with additives which came in bags of 50, 80 or 100 pounds, although there were few 80 or 100-pound bags. He had help with this and usually handled only 20 to 30 bags personally.

This matter went to preliminary hearing on October 6, 2008, at which time the ALJ found claimant's then need for medical treatment stemmed from the accident suffered while working for respondent. The matter was appealed to the Board and a single Board Member affirmed the Order, finding the opinion of Dr. Haleem convincing when he stated that claimant's current right knee pain could be caused by the type of work situation in which claimant was involved. The Board Member noted the MRI of the right knee from July 2008, revealed a tear of the posterior horn and midbody of the medial meniscus. He noted, with significance, the opinion of Dr. Haleem that, although claimant's subsequent work activities were the type that could cause the then needed right knee treatment, he did not opine that they did. There was no dispute that claimant had suffered degenerative arthritis in both knees for many years. He likewise suffered a compensable accident while working for respondent on September 15, 2006. It was held the current need for treatment, including the recommended right knee arthroscopic surgery for the torn meniscus, was a direct consequence of the September 15, 2006, accident.

On March 13, 2009, Dr. Haleem performed a left medial meniscectomy and chondroplasty of the medial femoral condyle and patellofemoral joint of the left knee. The post surgical appointment on March 26, 2009, indicated significant improvement in the left knee with a pain level of 1 out of 10. Dr. Haleem did note significant advanced degenerative joint disease during the surgery.

Claimant underwent a right medial meniscectomy and chondroplasty of all three compartments of his right knee on May 8, 2009. The May 28, 2009, report indicates claimant appeared on May 20, 2009, with significant improvement shown. The pain level in the right knee was listed as 0 out of 10. Claimant was released to regular work, without restrictions.

In a note of September 17, 2009, Dr. Haleem noted bilateral osteoarthritis in claimant's knees and an increase in claimant's pain level to a 5 out of 10. After a discussion with claimant, it was determined the best course was to proceed with a trial of Synvisc injections, bilaterally. The Synvisc injections continued for several years. Claimant's last injection was on January 7, 2013. After that injection failed to help with his

pain the injections were stopped and he was told he needed bilateral knee replacements because his knees were bone on bone.

Claimant's current employment remains with Allied Cement. He started out driving a truck. But, now he works outside of the truck as a cementer. Claimant's job originally was to help load the bulk truck with additives which come in bags of 50, 80 or 100 pounds. He had help with the loading of these bags. Most days claimant handled 8 to 10 bags. Claimant's job as a cementer also required he drive a pickup, fill out paperwork and occasionally help to carry hoses. He currently rarely carries any bulk items. He does use the steps on the rig to go up and down. Claimant couldn't say that his work for Allied caused him pain as he is in pain all the time anyway. Claimant works 65 hours, 7 days a week. He is on call 24 hours a day.

The records indicate claimant's treatment including the Synvisc injections, was transferred to orthopedic surgeon Robert L. Bassett, M.D., also of the Hays Orthopedic Clinic in 2010. In a letter dated February 18, 2013, Dr. Bassett, opined:

> I reviewed Mr. Wentz's record. He has been receiving Synvisc as a workmen's compensation treatment status post bilateral meniscectomies in 2006. At the time of the surgeries, the patient in fact had severe arthritis of both knees which was treated with chondroplasty at that time. The arthritis was listed as grade IV chondromalacia. This clearly predated his fall, was not caused by the fall, and is separate from the fall. He does need total knee replacements. I have been treating him for arthritis for years and doing Synvisc injections for years. He has progressed to the point where he has pain all the time, difficulty walking and weakness and would be great candidate for surgery. Again, the arthritis appears to have been present prior to the meniscal surgery and was longstanding and quite severe. Therefore, it appears that the arthritis is in fact a result of degenerative conditions preoperatively. My agreeing to do surgery on him was based upon his symptoms, and my thought that it was worker's compensation related was related to the fact he had been receiving Synvisc injections as worker's compensation treatment.[1]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-501(a)

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether

[1] P.H. Trans. (June 10, 2013), Resp. Ex. 1.

> the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 44-508(e)

> (e) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[2] When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[3] In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[4]

Claimant's initial injury on September 15, 2006, resulted in injuries to his knees requiring surgical repair. Dr. Haleem noted at that time that claimant also had preexisting and significant osteoarthritis in both knees. While claimant's results from the surgeries were excellent, with claimant's pain being reduced to almost nothing, the pain from the preexisting conditions resurfaced shortly after his return to work. Claimant was forced to undergo several years of injections to help with the ever worsening conditions. Ultimately, those injections were not enough to alleviate the pain. The current recommendations for knee replacements stem from the osteoarthritis rather than the injuries suffered at the time of the fall. Dr. Bassett's opinion from February 18, 2013, is specific. Claimant's arthritis predated, and was not caused by claimant's fall. In the doctor's words, it "is separate from the fall."

This Board Member finds claimant's current need for medical treatment, including the bilateral knee replacements, stems from the long-standing osteoarthritis in his knees

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[2] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[3] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

and not from the September 15, 2006, accident with respondent. Claimant's work for his current employer is the more likely villain in this instance, possibly causing ongoing aggravation to his knees. The Order of the ALJ denying medical treatment is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove his current need for medical treatment to his knees stems from the work accident with respondent on September 15, 2006. The Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated June 11, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: R. Douglas Sebelius, Attorney for Claimant
rdsebelius@yahoo.com

William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
wtownsley@fleeson.com
pwilson@fleeson.com

Pamela J. Fuller, Administrative Law Judge

[5] K.S.A. 2012 Supp. 44-534a.